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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1187

ROBERT L. PARKMAN, JR.,

Petitioner

versus

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

HILARY J. GAUDIN
727 Hibernia National Bank Bldg.
New Orleans, Louisiana
70112

Attorney for Petitioner

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Petitioner, Robert L. Parkman, respectfully prays that a Writ of Certiorari issue to review the per curiam and judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on November 15th, 1973.

OPINIONS BELOW

The judgment and per curiam of the Court of Appeals appears in Appendix A hereto. Judgment and commitment of the United States District Court, Western District of Louisiana,

Alexandria Division, appears in Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on November 15th, 1973. A due and timely petition for rehearing was denied on January 4, 1974. A copy of the order denying the petition for rehearing appears hereto as Appendix C. This court's jurisdiction is invoked under 28 United States Code, Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

Petitioner Robert L. Parkman, Jr. presents the following issues for review:

1. Whether there was prejudicial error in denying a severance as to the multiple conspiracy issue presented in a pre-trial motion and whether there was error in denying a new trial on the same basis;

2. Whether the court erred in its interpretation of the documents requested by the jury;

3. Whether the court erred in denying a motion for a bill of particulars;

4. Whether the court erred in denying a mistrial based upon the government's knowing use of perjured testimony and other aspects of misconduct;

5. Whether the court erred in denying a motion for a new trial, based upon obviously unfair tactics employed by the government;

6. Whether the court erred in refusing to treat the testimony of the witnesses in the New Orleans trial as Jencks Act material;

7. Whether the court erred in denying the appellant's motion for a new trial, based upon gross irregularities relative to the foreman of the jury and members of the jury;

8. Whether unwarranted delay in the prosecution of this case requires a dismissal of same;

9. Whether the trial judge should have permitted the trial to proceed for days, without one defendant C. Danny McGee being absent, likewise his attorney;

10. Whether the trial court should not have granted a mistrial, when said trial judge permitted the Government to examine a Government witness, who pled guilty in the New Orleans case, and then testified in the Alexandria case; and gave most highly prejudicial testimony, uncorroborated to the Alexandria jury;

11. Whether the courts erred, both in New Orleans, Louisiana and Alexandria, Louisiana, trying <u>one conspiracy</u> with different overt acts, not consonant, in two segments, before two separate and distinct juries; <u>in two phases</u>;

12. Whether the court erred in not granting a new trial, where petitioner <u>Robert L. Parkman, Jr. was acquitted of the conspiracy</u>. Yet the trial

judge had permitted the hearsay and prejudicial testimony to be heard by the Alexandria jury. If such procedure be permitted, then the constitutional and inalienable rights, guaranteed, are naught and to no avail;

13. Whether the Government should not have misled the trial judge in advising that other defendants, would be tried in a third segment of the one conspiracy at a later date, and then within a period of days, dismissed the defendants in still another jurisdiction in the United States District Court in Lake Charles, Louisiana before a third federal judge with the following reasons:

"Legal delays in going to trial and deterioration of evidence the Government no longer feels that it is able to prove the case against the two."

Hence the Government tried two cases in two jurisdictions of one conspiracy and dismissed a third in yet another jurisdiction.

STATEMENT OF THE CASE

This writ involves the conviction of Dr. Robert L. Parkman Jr. on substantive mail fraud counts based upon the operation of a complicated and fraudulent scheme to defraud insurance companies by means of faked auto accidents. This case is a companion to a similar one tried in New Orleans, as the same conspiracy.

The instant case, by the time it went to trial, contained only three defendants, appellant Dr. Robert L. Parkman Jr., Payton

Covington, an attorney, and one "Danny" McGee.

The scheme, originally conceived by Ken De Mary, and his brother Larry, and one Pancho Perez, was also being operated "on their own" by other parties not before the Court here.

The modus operandi, as declared by the Government in argument, was to have a succession of lawyers handling the faked accident claims and these attorneys would have to be replaced from time to time lest the insurance companies become suspicious as to the number of claims being handled by the same lawyers. Thus, when a particular lawyer became "burnt out" by reason of handling a surfeit of faked claims, he was replaced.

The "victims" were a pitiful collection of down and out idiots who sometimes risked actual injury for as little as Fifty Dollars. Sometimes the collision was faked but at other times the cars actually collided. In at least one instance there was a rear end collision with the hitting vehicle traveling at about forty miles an hour.

The role of the various parties may be subdivided into: (A) "victims"; (B) Conspirators or coschemers; (C) Doctors; and (D) Lawyers.

The "Conspirators or co-schemers" were the evil geniuses of the fraudulent operation. They included not only Ken DeMary, a "con-artist" supreme (who had an unsavory criminal record during the time the Government was letting him down with a token sentence in return for his singing loud and clear like a bugle-voiced canary against everyone else whom the Government elected to prosecute), but also his brother Larry, plus an attractive practising

prostitute, and several other unsavory entrepreneurs.

The multiple aspects of the conspiracy are dealt with in argument below but here we observe, en passant, that appellant, Dr. Parkman, though convicted on numerous substantive counts (after the jury had been out three days and had been repeatedly sending notes to the Judge that they could not agree on the guilt or innocence of Dr. Parkman) WAS ACQUITTED ON THE SOLE CONSPIRACY COUNT, NO. 40.

Thus, clearly Dr. Parkman was forced to bear all of the prejudicial aspects of a conspiracy trial as to which conspiracy the jury found him innocent.

Except for the testimony of Ken DeMary the "victims" declared that the doctors involved were not "in" on the nature of the accident and were sent to the various doctors to whom they were directed with an entirely plausible story.

Aside from the testimony of Ken DeMary (who was shown to have had a vicious prejudice against Dr. Parkman and a motive for which led him to make threats against the Doctor when he would not submit to certain demands) the Government's case against Dr. Parkman may be described as follows:

Certain "victims" would take the stand and testify that the treatments given were not nearly as numerous as those reflected by the bills submitted. These "victims" were themselves frightened lest they be prosecuted for their part in the fraud and their eagerness to tell the Government what it wanted to hear led to some ridiculous results. One woman, testifying some six years after the treatments given

declared that the reference in Dr. Parkman's medical report to her having said she was suffering from a headache was bound to have been wrong because she never had headaches. Other eager victim witnesses, under the whiplash of fear, made reckless statements on the stand, provably false.

A fire had destroyed many of the records of Dr. Parkman's patients and when he voluntarily produced the remaining records involved in this case, the Government resorted to most unfair tactics, discussed in detail in argument below. It was suggested to the jury that the xxxxxx entries on the "patient cards" were inserted by the Doctor to make the number of visits and nature of the treatments correspond with the bills furnished the lawyers for transmittal to the insurers. NOT ONLY THAT, BUT MR. PRINGLE, ONE OF THE UNITED STATES ATTORNEYS HANDLING THE CASE, SUGGESTED TO THE JURY THAT COUNSEL FOR DR. PARKMAN MIGHT HAVE "FAKED" THE ENTRIES.

This was but one of many instances of "foul play" at the hands of certain Government representatives. But the "unfair tactics at the cross roads" of litigation began long before trial and before present counsel ever got into the case.[1]

Before undersigned counsel ever represented Dr. Parkman, another defendant, Nathan Cormie, a Lake Charles lawyer, filed a motion to

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1/ Bennett Johnston, who ran for Governor of Louisiana, was first employed as counsel for Dr. Parkman, but had to retire from the case due to the pressure of the gubernatorial campaign, which he almost lost, but then won election to the United States Senate.

dismiss based upon the ground that another United States Attorney, who had handled the Grand Jury which indicted him, was at that time in the secret employ of one of the affected Insurance Companies. In this Motion, paragraph two, it stated: "These insurance companies had threatened reprisals against mover for the past fifteen years and for the more recent several years had special investigators assigned to try and set up any kind of charge against mover, sending them from one pimp, prostitute, drug addict, jailbird and/or degenerate to another, telling them it was Nathan A. Cormie they were after and asking them for help, under circumstances where these investigators would imply they were of some official capacity or carried weight and/or influence with which they would help these criminals and undesirables, which agents of the insurance companies would speak in terms of 'we' or 'our companies' want so and so and will prosecute." (Emphasis added)

This motion, along with some other twenty-five pre-trial motions filed by the various defendants, was dismissed. However, Cormier's motion, though denied out of hand along with a basketful of others, had a telling effect. FOR SOME UNDISCLOSED REASONS, THE GOVERNMENT MOVED TO SEVER THE CASE AS TO NATHAN CORMIER THEN, AFTER THIS CASE WAS CONCLUDED, DISMISSED THE CASE AGAINST CORMIER, BEFORE A JUDGE IN LAKE CHARLES WHO WAS A STRANGER TO THESE PROCEEDINGS, ON THE GROUND THAT THE EVIDENCE HAD "DETERIORATED" SO THAT PROSECUTION WAS IMPRACTICAL.

No explanation was made or even attempted as to how the evidence against Cormier (of the same vintage as that against the defendants in the instant case) had "deteriorated" so as to make prosecution impractical in his case, but

perfectly proper against the remaining defendants. The actual motivation of the Government in this conduct remains as much as legal mystery as the disappearance of Justice Crater in years gone by.

Courts are accustomed to hearing shrill cries as to a supposed "miscarriage of justice". But here we say--loud and clear--"This was no miscarriage. This was an abortion; and blood from this illegal operation is all over the record and on the hands of Government Representatives whose identity can only be surmised."

DR. PARKMAN'S BACKGROUND AND LACK OF MOTIVATION

Dr. Parkman was a highly successful doctor who operated a clinic in Bossier City, Louisiana, which grossed upwards of $110,000.00 a year. He was highly popular in the Shreveport area.

Dr. Parkman was a member of the governing Board of the Methodist Church and active in politics, having run unsuccessfully for the Parish School Board. He had been a Navy airplane pilot in World War II and the Korean War, having been honorably discharged. He was a member in good standing of all the medical societies, and of the Board of Family Practice.

As will be shown below in more detail in argument below, it is incredible that a man of his character would have been willing to risk his medical license and prison for the paltry sums he actually received in these cases, about $1,000.00. Moreover, when we consider the fact that these "staged" accidents, in some instances very dangerous, (involving actual collisions between cars proceeding at forty miles an hour and in which the "victims" were sometimes injured to some extent), it seems inconceivable

that a doctor--any doctor--could have deliberately participated in such frauds as those presented here. The sole reason Dr. Parkman was indicted here was that the Government "bought" the theory of their conniving pet canary, Ken DeMary, who had a vicious disposition and was proven to have threatened Dr. Parkman when he would not aid him in his financial woes. In other words, DeMary tried to "shake him down" and failing in that, offered perjured testimony to convict him in this case.

As one basis for a new trial, appellant Parkman charged the Government with having knowingly used perjured testimony, i.e., the testimony of Ken DeMary. At trial Ken DeMary was confronted with testimony at the New Orleans trial, wherein he failed to state a key fact which he sprung for the first time in the instant case. (Excerpts from testimony at New Orleans trial, conflicting with his testimony in the instant case). In opposition to this motion the Government urged that the inconsistent testimony was not deliberately elicited. As we will show, the Government had Ken DeMary under wraps and under guard during the better part of this trial.

He was their star ball carrier and they were bound to know what he would say. He obviously was interrogated, in depth, as were all the other Government witnesses, before he ever took the stand. There can be no escaping, via semantic ballet dancing, what really happened here. The Government deliberately put on an admitted perjurer, thief, "con-man", and wholesale liar, to supply the "missing link" in the whole chain of circumstantial evidence necessary to incriminate an innocent man, much beloved in his community.

We cannot say why so many unusual twists and turns occurred in this case. As Robert

W. Service would put it:

> "There are strange things done
> 'Neath the midnight sun,
> By the men who moil for gold"

or as Judge Shakespeare put it, in a rather well known case:

> "There are stranger things on Heaven and earth
> Than are dreamed of in your philosophy, Horatio."

One can only wonder at some of the tactical mysteries presented in this case. There are cases to the effect that, while the Government has a certain amount of discretion as to whom it will prosecute and whom it will not prosecute, sheer arbitrariness in this regard can amount to a denial of due process.

THE CONVICTION AND SENTENCE

After the jury, over a period of three days, had been sending notes to the Judge declaring their inability to agree over the guilt or innocence of Dr. Parkman or Payton Covington, the attorney, the Court gave the Allen charge, under prejudicial circumstances noted below. Weary and in obvious low spirits, the jury trooped in finally with a verdict of guilty to Dr. Parkman as to some nineteen substantive counts, <u>BUT NOT GUILTY AS TO THE SOLE CONSPIRACY COUNT</u>.

HE WAS PLACED ON PROBATION AND FINED A TOTAL OF NINE THOUSAND DOLLARS ($9,000.00). THE LOUISIANA STATE MEDICAL BOARD, AS USUAL IN CASE OF ALL FELONY CONVICTIONS, HAS SUSPENDED HIS MEDICAL LICENSE. SINCE THEN, DR. PARKMAN, WITH THE APPROVAL OF THE SAID MEDICAL BOARD, HAS MOVED TO NEW ORLEANS, WHERE HE IS

EMPLOYED AT CHARITY HOSPITAL AT A MODEST SALARY, UPON WHICH HE SUPPORTS A WIFE, TWO TEEN AGE DAUGHTERS, AND A MOTHER-IN-LAW AND FATHER-IN-LAW.

SPECIFICATIONS OF ERROR

Appellant assigns as error, the following:

1. The Court erred in denying the pre-trial motion for severance based upon the multiplicity of conspiracies charged and the motion for new trial based upon the same contention.

2. The Court erred in his interpretation as to the documents which should be presented to the jury at their request.

3. The Court erred in not declaring a mistrial when the jury, over a period of three days, repeatedly informed the court of their inability to reach a decision as to the guilt or innocence of Dr. Parkman; and further in not informing the jury that if they could not agree within a reasonable time, they would be discharged.

4. The Court erred in denying a motion for a new trial, based upon the Government's knowing use of perjured testimony of Ken DeMary, the prime villain in this case. He had already testified in the New Orleans trial when the instant case was tried.

5. The Court erred in denying a motion for a new trial, based upon certain unfair tactics employed by the Government during the trial.

6. The Court erred in refusing to treat the testimony of the witnesses in the related

New Orleans trial as Jencks Act material.

7. The Court erred in denying our motion for new trial based upon irregularities relative to the foreman of the jury and the members of the jury.

8. The case should have been dismissed because of prejudicial delay in prosecuting this case.

ARGUMENT

FIRST ERROR: Our contention that: THE COURT ERRED IN DENYING THE PRETRIAL MOTION FOR SEVERANCE BASED UPON THE MULTIPLICITY OF CONSPIRACIES CHARGED AND THE MOTION FOR NEW TRIAL BASED UPON THE SAME CONTENTION.

Appellant Parkman was convicted on some 19 substantive counts of mail fraud but was acquitted of the sole conspiracy charge, Count 40 of the indictment. The attorney involved, Payton Covington, (Who was represented by Camille Garvel, a powerhouse of politics and leading criminal lawyer in Alexandria and points south) was acquitted on all forty counts. This naturally leads us to the rather obvious question:

IF DR. PARKMAN WAS NOT GUILTY OF CONSPIRING WITH ANYONE, HOW COULD HE HAVE BEEN FOUND GUILTY OF EVEN ONE SUBSTANTIVE COUNT?

The fake accidents involved, according to the argument advanced by the Government to the jury called for a "team effort" involving:

(a) A lawyer, who handled the settlements with the insurers and provided the "front money";

(b) The "victims"; and

(c) A doctor.

But, if Dr. Parkman was found by the jury to have been innocent of any conspiracy with anyone how could he have been guilty of a single substantive offense unless he was "running his own conspiracy"?

Of course, the foregoing addresses itself to the weight of the evidence and the inconsistency of the verdict, rather than the specific error urged here, the prejudicial joinder in a multiple conspiracy indictment. The real thrust of our argument here is the prejudicial joinder in a multiple conspiracy indictment.

The Federal concept of conspiracy has done considerable evolving through the years and we shall not waste the time of the Court by discussing presently established principles, i.e. that no formal agreement is necessary, that a Johnny Come Lately conspirator may be deemed a party to the conspiracy, that one does not need to know the identity of all the conspirators, etc.

We shall not chart a course here along the serrated coastline of judicial mapmaking. Rather we choose to navigate appellants ship by certain harbor lights which shine brightly as the traffic signals on Canal Street or the eyes of a young girl who has just received her engagement ring.

The first of these harbor lights is:

UNITED STATES V. BEKOWIES, 432F. 2d 8, a 1970 Ninth Circuit decision in which that Court declared:

> The indictment alleged a conspiracy between Bekowies and Weil to harbor Davidson in violation of 18 U.S.C. 1071. To sustain a conviction under the latter statute, it is necessary to show that the defendant had "notice or knowledge of the fact that a warrant of process has been issued" for the fugitive. It is hornbook law that when knowledge of a fact is required to convict for conspiracy to commit the substantive offense. Ingram V. United States, 360 U.S. 672, 678, 79 S.Ct. 1314, 3 L.Ed.2d 1503 (1959); United States V. Ausmeier, 152 F.2d 349 (2d Cir. 1945); Fullbright V. United States 91 F.2d 210 (8th Cir. 1937).
>
> The only evidence in this record from which the jury could have interred knowledge of the Davidson arrest warrant by either Weil or Bekowies was Agent McLeod's testimony that he had shown it to them. Hence the conspiracy cannot have begun before McLeod entered Bekowies' apartment.

On the same page, in footnote 6, the Court added:

> We are unpersuaded by the suggestion in dissent that the error in admitting Bekowies' statements was harmless beyond a reasonable doubt. Bekowies could not have been guilty of the offense of harboring Davidson until "after notice or knowledge of the fact that a warrant or process (had) been issued" for Davidson. 18 U.S.C. 1971. On this record, the only evidence of such notice was Agent

McLeod's reading of the warrant to Bekowies. Hence, if the statements made to Agent McLeod be suppressed, there is slight evidence that Bekowies' conduct in connection with the search was other than exemplary at any time after he had notice of the outstanding arrest warrant. Absent such evidence, Bekowies' other statements are as compatible with innocence as with guilt.

In any event, it is hard to believe that evidence as damning as that contained in the statements improperly admitted-evidence that Bekowies had lied to and deliberately mislead the agents-did not strongly influence the jury's verdict. See Chapman V. California, 386 U.S. 18, 23-24, 87 S.Ct. 824, 17 L.Ed2d 705 (1967); Fahy V. Connecticut, 375 U.S. 85, 86,87, 84 S.Ct. 229, 11 L.Ed2d 171 (1963). Nor is this a case where the challenged evidence was merely cumulative facts overwhelmingly established aliunde, as in Harrington V. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed2d 284 (1969). We note that the government's brief does not suggest that the error was harmless, nor challenge the appellant's statement in his opening brief that a new trial is required if any of the statements be excluded.

In Blumenthal V. U.S. 185 E2d 883 the Court declared (p.888):

It is true, as argued, that when one conspiracy is charged, proof showing only different and disconnected smaller ones will not sustain

conviction, and proof of crime committed by one or more of the defendants, wholly apart from and without relation to others conspiring to do the thing forbidden, will not sustain conviction. But, as herein indicated, the jury in this case was not confronted with that sort of situation. Here the evidence tended to prove, not a multitude of isolated conspiracies but a single general conspiracy in which the accused cooperated toward the same common end.

Appellant contend that the lower court erred in admitting in evidence certain sales of whiskey by Abel, Blumenthal and Feigenbaum to purchasers from them, without first having proved that appellants took part in a conspiracy, that is, until the corpus delicti was proved. But the corpus delicti itself may be shown to exist by overt acts such as an exchange of words, circumstances and events showing a course of dealings. Any or all of these may provide the basis from which the existance of the conspiracy might be inferred by the jury. Commission of the overt acts may constitute the best proof of the conspiracy and such evidence is often used for that purpose.[1]

[1]Marino V. United States, 9 Cir. 91 F. 2d 691, 698, 113 A.L.R. 975, certiorari denied 302 U.S. 764, 58 S.Ct. 410, 82 L.Ed. 593; Stack V. United States, 9 Cir., 27 F.2d

16, 17; Fisher V. United States, 4 Cir., 2 F2d 843, 846 Hoeppel V. United States, 66 App. D.C. 71 85 F 2d 237, 242; Rose V. United States 9 Cir., 149 F2d 755,759; American Tobacco Co. V. United States, 6 Cir. 147 F2d 93, 107; Glasser V. United States, 315 U.S. 60,62 S.Ct. 457, 86 L.Ed. 680; American Tobacco Co. V. United States, supra; McDonald V. United States, 77 U.S. App. D.C. 33, 133 F.2d 23.

Continuing the Court further declared (p889):

> In this case the Government relied on circumstantial evidence to show the existence of the conspiracy. The claimed offense is one which from its very nature can rearely be proved by direct evidence. Ordinarily only the results of a conspiracy, and not the private plottings, are observed. Like any other issue of fact conspiracy may be proved by circumstancial evidence. Rose V. United States, supra. To constitute an unlawful conspiracy no formal agreement is necessary. Lawlor V. Loewe, 235 U.S. 522, 35 S. CT 170, 59 LEd. 34; American Tobacco V. United States (Supreme Court, footnote 1). The crime is almost always a matter of inference deduced from the acts of the persons accused, which are done in pursuance of an apparent criminal purpose. Pearlman V. United States, 9 Cir., 20 F.2d 11, 114 (certiorari denied 275 U.S. 549, 48 S.Ct. 85, 72 L.Ed 419); Oliver V. United States, 10 Cir., 121 F.2d 245, 249; American Tobacco V. United States,

6 Cir., 147 F2d 93, 197. The proof need go no further than reach that degree of probability where the general experience of men suggests that it has passed the mark of reasonable doubt. Rose V. United States, supra.

The Government in its opening statement to the jury described a series of schemes which were clearly separate conspiracies. This opening statement shows that the scheme was an evolving sort of thing, involving many persons. Thus, Mr. Pringle stated: "It was a very rough scheme, that it progressed, became more refined, more polished...) etc."

The various schemes, arbitrarily lumped together for the purposes of the prosecution of this case involved large areas of the State being centered in Lake Charles, Bossier City or Shreveport and New Orleans. In a later statement to the jury Mr. Richards was to describe why it was necessary to change lawyers so often, that they became "burnt out" by being too frequently involved in fake accidents, hence subject to suspicion. The "evolving" nature of the scheme, drawing in different people as it progressed, is described in some detail by Mr. Pringle in his opening statement.

MOST IMPORTANT, THE EVIDENCE INDICATES LACK OF ANY CENTRAL CONTROL, BUT DIFFERENT GROUPS OF OPERATORS BEHIND THE VARIOUS SCHEMES.

Finally there were numerous instances in which evidence was admitted on the assumption that a conspiracy existed. By this we mean that otherwise hearsay statements were admitted which would otherwise not have been admissible. The objection to hearsay statements (on the ground that no conspiracy had

been established) was repeated by Counsel for Appellant and preserved throughout the trial. If, therefore, Judge Scott was wrong in his conclusion that a conspiracy had been shown, then there was a bushel of prejudicial testimonies paraded before the jury.

SECOND ERROR: Our contention that: THE COURT ERRED IN HIS INTERPRETATION AS TO THE DOCUMENTS WHICH SHOULD BE PRESENTED TO THE JURY AT THEIR REQUEST.

At one point, after the case had been submitted to the jury, the jury requested that all of the Dr.'s reports submitted to the Insurance Companies should be furnished to the jury for their inspection. The Court proposed to submit all of the reports made by Dr. Parkman to the attorney, Payton Covington. This was objected to by Mr. Gill, Counsel for Dr. Parkman on the ground that the Court's interpretation of the jury's request was incorrect and misleading. It seems clear that this objection was correct, because Dr. Parkman never submitted a single medical report or bill to the Insurance Companies. He merely transmitted these bills and reports to Mr. Payton Covington. By this error the jury was led to believe that Dr. Parkman was much closer to the "heart of the matter" than the undisputed facts show. There can be no question whatever but that Dr. Parkman did nothing but examine patients that were sent to him and sent his medical reports and bills to the attorney.

This error, therefore, may well have led to the three day quandary in which the jury found itself, finally convicting Dr. Parkman and exonerating Payton Covington.

The following excerpt from the record shows how this confusion occurred:

"THE COURT: The Court has received a note from the jury at 9:12 A. M. Thursday, February 24, 1972. It reads as follows: 'Please furnish (1) patient's records, and (2) bills to insurance companies submitted by Doctor Parkman. Donaldson, Foreman.' It is the Court's inclination to comply with this request but I want to hear from counsel from Doctor Parkman and get their consent for doing so.

"MR. LEPPERT: That is the twenty-eight patient records and the three which we submitted?

"THE COURT: Yes.

"MR LEPPERT: I will get those exhibits.

"THE COURT: In examining this request, the Court notes and some comment has been made that the request for patient records and for bills submitted by Doctor Parkman. The Court is taking the view that bills submitted by this defendant are the only ones that will be supplied to the Jury. If they wish others, they can request them.

"MR. GRAVEL: The Defendant Payton Covington in one instance, Your Honor, that I know of in the case, that one was not offered by Doctor Parkman or by the Government and did not go to the Insurance Company. That is a bill on Gale Causey, a bill dated May 17th. I mentioned it because I don't think it has any bearing, that bill was in Mr. Covington's file. It was offered by Mr. Covington. I think the Government did examine Doctor Parkman on that particular bill.

"MR. RICHARD: As I recall during the course of cross examination, Doctor Parkman was examined extensively on that very bill Mr. Gravel has reference to and I think that bill

should be included in the exhibits that go to the Jury.

"MR. GRAVEL: I think it would tend to confuse the Jury it may relate something to Mr. Covington - - "

The Court made the following ruling on this point:

"THE COURT: Let me see those. I am going to that Covington-Causey #1, #2 and #3 and Government Exhibit #77 are also included in the request by the Jury. In clarification and for the record the Court's holding is that the Court feels regardless of who had them or whom they were sent to, if they were submitted by Doctor Parkman ...

"MR. LEPPERT: That is bills that were sent to insurance companies.

"THE COURT: The Court will say this, it is aware of the fact that the insurance company itself would be the ultimate recipient of the bills. It is practically never named on the bills. In this case the Court is going to render an interpretation of what the Jury wished and it is going to supply all of the medical bills rendered on the letterhead of Doctor Parkman."

The attempt by the Court to read the mind of the jury proved highly prejudicial. Some twenty-eight medical reports were sent in to the jury as having been sent to the insurance companies by Dr. Parkman. The fact is that none of them were sent in by Dr. Parkman. He sent his report to the lawyer handling the case. Thus, the extent of his participation in the affair was greatly magnified. This alone may account for the fact that Covington,

who "bankrolled" the cases by advancing money, was acquitted while Dr. Parkman was convicted.

THIRD ERROR. Our contention that:

THE COURT ERRED IN NOT DECLARING A MISTRIAL WHEN THE JURY, OVER A PERIOD OF THREE DAYS, REPEATEDLY INFORMED THE COURT OF THEIR INABILITY TO REACH A DECISION AS TO THE GUILT OR INNOCENCE OF DR. PARKMAN: AND FURTHER IN NOT INFORMING THE JURY THAT IF THEY COULD NOT AGREE WITHIN A REASONABLE TIME, THEY WOULD BE DISCHARGED.

After the jury had been sending notes to the Judge over a three days period to the effect that they could not agree, as above indicated, and after a mistrial had been denied, a weary jury finally came in with the instant verdict, exonerating Payton Covington on all counts and convicting Dr. Parkman on nineteen substantive counts but acquitting him on the sole conspiracy count.

Under these highly unusual circumstances, we submit, the Court should have granted our motion to examine the jurors, or at least to examine the Foreman, Mr. Donnelly, as to what pressures he felt himself under due to the above circumstances. The authorities cited by the Government in opposition to having any hearing of this kind are by no means to be construed to prohibit any inquiry of this kind. In these circumstances, we submit, it was the duty of the Court to make a full inquiry and the failure to permit same was an abuse of discretion.

THIRD ERROR. Our contention that: THE COURT ERRED IN DENYING THE MOTIONS FOR A BILL OF PARTICULARS AND PRE-TRIAL MOTIONS FOR PRODUCTION OF RECORDS.

Even the most casual perusal of the lengthy, forty count indictment herein will indicate the complexity of the evidences charged herein. Not only were several conspiracies actually involved, as noted above in the argument on the First Error, but there was almost complete silence as to the roles played by various conspirators and "co-schemers". In such a situation, Dr. Parkman was in dire need of more information as to what he was being charged with. As stated in our memorandum in support of our pretrial motions:

"Under modern Federal jurisprudence your defendant has certainly shown a 'particularized need' for the documentary evidence for which he has asked production. His medical reports, letters pertaining to the cases involved, bills, statements, etc., all bear directly upon the very core of the controversy and it is absolutely necessary that he be informed of the nature of the proof which he will be confronted, particularly in an involved 'scheme' as set forth in the indictment. See:

Bowman Dairy vs. United States, 341 U.S 214 (1951);

United States v. Bennethum, 21 F.R.D. 227 (D.Del., 1957); and

United States v. Solomon, 26 F.R.D. 397 (S.D. Ill., 1960); and

United States v. Baker, 262 F.Supp. 657, 671 (Dist. Col. 1966).

Judge Scott at a hearing of certain pretrial motions frankly stated to counsel that this was his first major criminal case, and that he did not want to make any mistakes. His action, however, in denying all of some

twentyseven pre-trial motions, seems to indicate that discretion is not always the better part of valor and that had the able trial judge come to grips with some of the problems earlier in these proceedings, the mockery of a trial which took place here would not have occurred.

FOURTH ERROR: Our contention that: THE COURT IN DENYING A MOTION FOR A NEW TRIAL, BASED UPON THE GOVERNMENT'S KNOWING USE OF PREJURED TESTIMONY OF KEN DeMARY, THE PRIME VILLAIN IN THIS CASE.

Ken DeMary had previous dealing with Dr. Parkman because Dr. Parkman owned a part interest in the Sound on Sound Recording Studio and DeMary had connections with booking musicians. DeMary, a consistent dead beat, owed Dr. Parkman considerable sums of money and when the manager of the station cut off DeMary's credit, the latter became vicious.

Although he had denied it, there was very strong evidence that thereafter DeMary had threatened Dr. Parkman. Ken DeMary, a vicious, bitter man, obviously was out to get even with Dr. Parkman and this doubtless accounts for the fact that when he finally made his deal with the Government, he went out of his way to incriminate Dr. Parkman.

Several "victims" had testified to the effect that they were coached in simulating certain types of injuries and the whole thrust of their testimony is that the doctors were "kept in the dark" as to the actual fraud being perpetrated.

One of the Government witnesses related how the DeMarys had bragged about their cleverness in "putting it over on those doctors and lawyers".

In his campaign to punish Dr. Parkman, Ken DeMary, in his written statements to the Government agents, he frequently attributed guilty knowledge to Dr. Parkman, but he did so in a vague conclusory manner.

In the New Orleans trial, he had flatly denied having any meeting with Dr. Parkman at the recording studio.

At the trial of the instant case, however, it became obvious to the Government that if DeMary was to be believed by the jury, some precise information was necessary as to when and where Dr. Parkman became a part of this vicious conspiracy.

DURING THIS TRIAL THEREFORE, FOR THE VERY FIRST TIME, KEN DeMARY TOLD WHERE THE DEAL WAS MADE WITH DR. PARKMAN. HE SAID THAT IT TOOK PLACE AT THE RECORDING STUDIO. He was then confronted with his previous denial at the New Orleans trial as to ever having had any conference at the studio with Dr. Parkman and was asked to explain the direct conflict between his testimony in New Orleans and his testimony in Alexandria. Although the Court declared a recess to allow him to examine the entirety of his New Orleans testimony, in an effort to reconcile what he said then with what he was saying at the trial here, he could offer no explanation whatsoever.

In argument of motions for a new trial below, the Government has urged that the addition of the radically different portion of the DeMary testimony was elicited inadvertently and that the Government had no way of knowing that DeMary would spring these surprises.

We submit that this explanation seems

incredible. The Government had Ken DeMary under guard by Federal Marshals during the entire trial. In view of the numerous statements of his which have been referred to repeatedly throughout the trial, it seems highly unlikely that this new testimony was a surprise to the Government. The postal inspectors and other government agents are bound to have examined their witness meticulously before they put him on the stand. Moreover, the time and place when Dr. Parkman entered the conspiracy was a most important factor quo ad his guilt. To suggest, therefore, that this all important piece of evidence merely slipped in, unbeknown to the Government, through the cunning imagination of Ken DeMary, seems highly implausible. Someone on the Government's side is bound to have known that he would throw this "Sunday Punch" at the trial, and we suggest that the idea that this highly prejudicial incident just happened is not likely to deceive even a reasonably alert mongoloid idiot.

We submit that the misconduct was more clearcut and its effect more prejudicial than in the 1963 decision of this Court in HAWKINS V. UNITED STATES, (Fifth Circuit, 324 F. 2d 873.0).

FIFTH ERROR. Our contention that: THE COURT ERRED IN DENYING A MOTION FOR A NEW TRIAL, BASED UPON CERTAIN UNFAIR TACTICS EMPLOYED BY THE GOVERNMENT DURING THE TRIAL.

The conduct complained of here in a single heading covers the following:

A. The suggestion by Assistant United States Attorney, Mr. Pringle during cross examination of Dr. Parkman, that both he and his attorneys had deliberately altered his records for the purposes of this trial; and

B. The highly improper conduct of Mr. Pringle during the cross examination of Dr. Parkman suggesting, by the manner of his questions, and without any basis for doing so, that Dr. Parkman cheated on his Federal Income tax.

At the outset, it should be noted that if Dr. Parkman had wished to eliminate his clinical records so that they would be unavailable at the trial, he could have done so, simply by claiming that they had been destroyed in the records.

SIXTH ERROR: Our contention that:

THE COURT ERRED IN REFUSING TO TREAT THE TESTIMONY OF THE WITNESSES IN THE RELATED NEW ORLEANS TRIAL AS JENCKS ACT MATERIAL.

In a timely pretrial motion defendant Parkman, along with the other defendants, moved for production of the testimony in the New Orleans trial as being Jencks Act material. In our memorandum in support of this motion, we declared:

"While we find no decisions directly controlling, the clear implication of the 1970 decision by the Fifth Circuit in UNITED STATES V. MUNROE, 421 F. 2d 644, seems highly persuasive that, under the instant facts, such testimony would be classified as Jencks Act material. There, under a clearly different factual situation, the Fifth Circuit declared: (at Page 645)

> '(2) Another assignment of error stems from the failure to require the government to produce a transcript of the testimony of a witness who had testified in a previous prosecution of appellant. It is claimed

> that the Jencks Act, 18 U.S.C.A. #3500, made such production mandatory. We disagree. The earlier testimony of the witness had not been transcribed. There was no request for the testimony prior to trial and appellant's counsel participated in the prior trial and was thus familiar with the earlier testimony. We agree with the Seventh Circuit that a transcript of prior testimony, in this factual setting, does not come within the purview of the Jencks Act. United States v. Baker 7 Cir., 1966, 358 F. 2d 18, 19-20.'

"In the Baker case, cited by the Fifth Circuit in Monroe, supra, the Seventh Circuit, in refusing to classify testimony in a previous trial as Jencks Act material, declared: (at page 20 of 358 F.2d)

> '(2) But, assuming a court reporter in a separate trial does come within the wording of the Act, in the instant case there was no request or demand by defendant's counsel for such transcript prior to the trial.
>
> '(3) The Government has no obligation to transcribe stenographic notes of testimony in a criminal trial just in case some of the witnesses might be later called upon to testify in a related trial. Such a practice would create a heavy--and in our opinion--unnecessary burden.
>
> '(4) We hold that under these circumstances of the instant case, in the absence of a demand or request

> for such a transcript prior to the trial, and a showing that a defendant was unable to pay the court reporter for such a transcript, the Government had no duty to have such transcripts available. We hold there was no error in this respect.'

"Here the facts are certainly different, since the request for the prior testimony has been requested prior to trial. Moreover same has already been written up for use in the pending appeal.

"Finally, the clear implication by the 1968 decision of the Second Circuit in UNITED STATES V. COVELLO, 410 F.2d 536, is that testimony in a previous trial may be classed as Jencks Act material under some circumstances. At issue there was whether or not certain testimony taken at a pre-trial motion to suppress was to be classified as Jencks Act material. The Court holding that a pretrial motion was not a 'trial' within the intendment of the Jencks Act, denied the motion to classify, stating: (at page 544 of 410 F.2d)

> '****In any event, the courts have consistently construed the statute literally, reading 'trial' to mean 'trial', and have held that under 18 U.S.C. #3500 the pre-witness-stand statements of persons testifying at suppression hearings are not comprehended within the statements the defense is entitled to examine at suppression hearings. See United States v. Gidiano, 348 F. 2d 217 (2 Cir.), cert denied, 382 U. S. 946, 85 S. Ct., 406, 15 L. Ed. 2d 354 (1965); United States v. Wallace, 272 F. Suppl. 838 (SDNY 1967); United States v. Cobb,

271 F. Supp. 159) 164 (SDNY 1967; United States v. Leighton, 265 F. Supp. 27, 35 (SDNY), affirmed, 386 F. 2d 822 (2 Cir. 1967), cert. denied, 390 U. S. 1025, 88 S. Ct. 1412, 20 L Ed 2d 282 (1968); United States v. Tane, 29 F.R.D. 131, 133 (EDNY 1962); United States v. Abrams, 29 F.R.D. 178, 183 (SDNY 1961); United States v. Rosenberg, 157 F. Supp. 654, 661 (E.D.PA) affirmed, 257 F 2d 760 (3 Cir. 1958), affirmed, 360 U.S. 367, 79 S.Ct. 1231, 3 L.Ed. 2d 1304 (1959).'"

SEVENTH ERROR: Our contention that:

THE COURT ERRED IN DENYING OUR MOTION FOR NEW TRIAL BASED UPON IRREGULARITIES RELATIVE TO THE FOREMAN OF THE JURY AND THE MEMBERS OF THE JURY.

Under this heading we group a number of incidents commencing shortly after the selection of Mr. Donnelly as foreman of the jury and continuing on through the deliverations of the jury.

Mr. Donnelly was a retired Army Colonel and a resident of the Alexandria area. After he had been selected as a juror by both sides without objection, Mr. Pringle, Assistant United States Attorney, provoked a hearing in chambers as to the possibility of any influence which Mr. Gravel, counsel for Payton Covington, had over Mr. Donnelly, Mr. Gravel answered in terms indicative that he had no direct influence over Mr. Donnelly.

Thereafter, Mr. Donnelly was summoned by Judge Scott to his chambers where he was interrogated privately, and the Judge thereafter announced that he was satisfied that there

was no improper influence over Foreman Donnelly. Counsel for defendants noticed Foreman Donnelly waiting outside the Judge's office and although no formal objection was made, it was later urged that this unusual procedure was prejudicial to the defendants because the Foreman, virtually in custody of the Marshal, was bound to feel that he was under suspicion of some impropriety and, being a retired Army officer, such situation was bound to create a certain amount of pressure upon him (whether he yielded to it or not) by taking a strong pro-Government stance in the trial.

During the three days in which the jury was unable to reach any agreement as to the guilt or innocence of either Payton Covington or Dr. Parkman, there was evidence, visible from the jury box, that Foreman Donnelly was having considerable difficulty with his jurors. He asked the Court, in angry terms, to instruct the jurors on certain matters. There were a number of negro jurors on the panel and these, beyond question had been strongly influenced by the testimony of the negro character witness who had testified so eloquently as to what Dr. Parkman had done for his people in the Shreveport-Bossier area.

EIGHTH ERROR: Our contention that:

THE CASE SHOULD HAVE BEEN DISMISSED BECAUSE OF PREJUDICIAL DELAY IN PROSECUTING THIS CASE.

Some six years had elapsed between the commission of the acts charged and the trial of the "Alexandria branch" defendants. At the hearing before this Court of the appeal from the New Orleans branch of the case, a member of the panel asked pointedly and repeatedly why that case had been allowed to

hang fire so long.

Moreover, in dismissing the case against Nathan Cormier in Lake Charles, the Government stated that the evidence "had deteriorated so much that it was impractical to try Cormier. Obviously, what was sauce for the Cormier goose should have been sauce for the Parkman gander, but the Government was playing ducks and drakes in a strange manner in a reply brief, once the Government has stated its position in this sorry and sordid little drama.

The indictment in this case was returned June 27, 1969. It is well settled that: "Four relevant factors for consideration of a claim of denial of a right to a speedy trial are length of delay, reason for delay, prejudice to defendant, and waiver, if any." U.S. v. PEREZ, 398 F.2d 658, cert. denied 393 U.S. 914 and cases collected in Federal Digest, Vol. 16A, Criminal Law, Key Number 573.

Counsel for appellant have requested a transcript of the remarks of the United States Attorney in dismissing the case against Nathan Cormier in Lake Charles, as reported in the press on the grounds that the evidence against him had deteriorated to an extent that it had become impractical to prosecute him. This request has not been granted as of the date of filing this brief.

CONCLUSION

So say we here. We respectfully submit that this Court set aside in ringing tones, a great miscarriage of justice. We submit that, on the Eighth Error, supra, the case should be dismissed; or, alternatively, that a new trial be ordered.

Respectfully submitted,

HILARY J. GAUDIN
727 Hibernia National Bank Building
New Orleans, Louisiana 70112

Attorney for Petitioner

C E R T I F I C A T E

I certify that a copy of the foregoing brief has been served upon the Office of the United States Attorney for the Western District of Louisiana, Alexandria Division, by mail on the 30th day of January, 1974.

Hilary J. Gaudin

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-2139

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ROBERT L. PARKMAN, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Louisiana

(November 15, 1973)

Before JONES, GODBOLD and INGRAHAM, Circuit Judges.

PER CURIAM: Robert L. Parkman was convicted by a jury of violating the mail fraud statute, 18 U.S.C. § 1341,[1] in connection with a plan to defraud various

[1]This statute provides:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other

insurance companies. "The Louisiana-wide get-rich-quick scheme involved the staging of fraudulent automobile accidents for the purpose of creating false personal injury claims. These claims would be submitted to the insurance carriers for the respective vehicles involved in the wrecks with the aid and contrivance of certain physicians and laws."[2] Parkman was one of the physicians. His violation of the statute stems from the use of the mails to transmit fraudulent medical bills to the insurance companies.

We have examined each of the specifications of error raised by the defendant, and none provide a basis for reversing his conviction.[3] The judgment is accordingly AFFIRMED.

---

article or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

[2] *United States v. Perez*, ____ F.2d ____ (5th Cir., 1973) [No. 71-1066, October 25, 1973, Slip Op. at 2]. In *Perez* Chief Judge Brown explained in some detail the inner workings of this scheme, and we refer the reader to that opinion for additional information. The defendants in *Perez* were indicted and tried in the Eastern District of Louisiana, while Parkman was indicted and tried in the Western District. Although the scheme was statewide, Parkman's activities were confined to the Bossier City-Shreveport area.

[3] *See* Local Rule 21: *NLRB v. Amalgamated Clothing Workers of America*, 5 Cir. 1970, 430 F.2d 966.

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United States Court of Appeals

FOR THE FIFTH CIRCUIT

APPENDIX B

October Term, 19 72

No. 72-2139

D. C. Docket No. CR 18, 870

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ROBERT L. PARKMAN, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Louisiana

Before JONES, GODBOLD and INGRAHAM, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

November 15, 1973

Issued as Mandate:

APPENDIX C

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

U. S. COURT OF APPEALS
FILED
JAN 4 1974
EDWARD W. WADSWORTH
CLERK

No. 72-2139

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
ROBERT L. PARKMAN, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Louisiana

ON PETITION FOR REHEARING

(January 4 , 1974)

Before JONES, GODBOLD and INGRAHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

APPENDIX D

Judgment and Order (Probation (May 1953) (Cr. Form No. 1014

United States District Court

FOR THE

WESTERN DISTRICT OF LOUISIANA - ALEXANDRIA DIVISION

U. S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED
MAY 9 1972
ALTON L. CURTIS, CLERK
By Mary W. Gainey

United States of America

v.

ROBERT L. PARHAM, JR.

No. 18,870

On this the 22nd day of AUGUST, 19 72 came the attorney for the Government and the defendant appeared in person and represented by James J. Dorner, Attorney, G. Wray Gill, Attorney, Hillary Gaudin, Attorney and George Leppert, Attorney, entered a plea of NOT GUILTY.

It Is Adjudged that the defendant has been convicted upon his plea of NOT GUILTY, and Jury Verdict of 2-25-72 of GUILTY as to Counts 1, 2, 3, 4, 5, 6, 27, 28, 29, 30, 31, 32,33,34, 35, 36, 37 and 38.

VIOLATION OF: 18 USC 1341 - Executing scheme & artifice to defraud and to obtain money and property by false pretenses, using mails to defraud. (Cts. 1, 2, 3, 4, 5, 6, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37 and 38)

as charged IN THE INDICTMENT OF FORTY (40) COUNTS

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

AND ON THIS 9TH DAY OF MAY, 1972:

It Is Adjudged that defendant be committed to the custody of the Attorney General or his authorized representative for a term of 18 months and fined the sum of $500.00 on each of Counts 1, 2, 3, 4, 5, 6, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37 and 38, the term of imprisonment on each count to run concurrently.

The execution of the sentence as to imprisonment only is suspended and defendant is placed on three (3) years supervised probation on the special condition that the fines provided in this judgment be previously paid.

It Is Further Ordered that during the period of probation the defendant shall conduct himself as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

Norman S. Scott

NORMAN S. SCOTT *United States District Judge.*

Clerk.

A True Copy. Certified this 9 day of

(Signed) *Clerk.* *(By)* *Deputy Clerk.*

PPA

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MICHAEL RODAK, JR

No. 73-1187

In the Supreme Court of the United States

OCTOBER TERM, 1973

ROBERT L. PARKMAN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
HENRY E. PETERSEN,
Assistant Attorney General,
JEROME M. FEIT,
JAMES A. ROTHSCHILD,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1187

ROBERT L. PARKMAN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 488 F.2d 1392.

JURISDICTION

The petition for a writ of certiorari was filed on Feb- on November 15, 1973 (Pet. App. B). A petition for rehearing was denied on January 4, 1974 (Pet. App. C). The petition for a writ of certiorari was filed on February 4, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether multiple conspiracies were charged requiring the district court to grant a severance or a new trial.

2. Whether the district court erred in its interpretation of documents requested by the jury.

3. Whether the district court was correct in not declaring a mistrial when the jury initially indicated its inability to reach a verdict.

4. Whether the district court erred in denying a motion for a bill of particulars.

5. Whether the district court erred in denying a motion for a mistrial based on the alleged knowing use of perjured testimony.

6. Whether the district court erred in denying motions for a new trial based on alleged unfair tactics of the government.

7. Whether the district court erred in refusing to treat testimony of a witness at a former trial as Jencks Act material.

8. Whether the district judge's interview of the jury foreman, to determine whether his distant kinship to one of the defendants would require him to be excused, was prejudicial.

9. Whether the district court erred in refusing to dismiss the case because of alleged prejudicial delay in prosecuting the case.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Louisiana, peti-

tioner was convicted on eighteen counts of mail fraud, in violation of 18 U.S.C. 1341.[1] He was sentenced to eighteen months' imprisonment on each count, to run concurrently, and a $500 fine on each count. Execution of the sentence was suspended and petitioner was placed on three years' probation. The court of appeals affirmed *per curiam* (Pet. App. A).

In November 1965, Kenneth DeMary was approached by a friend, Mayo "Pancho" Perez, with the suggestion of making money by staging automobile collisions and filing fraudulent insurance claims for purported physical injuries (Tr. 1460). DeMary was acquainted with several attorneys in the Bossier-Shreveport area of Louisiana and was confident that he could arrange, not only for someone to drive a "hitter" vehicle, but also for attorneys to handle their claims (Tr 1460).

Commencing with a collision in November 1965, and continuing until approximately September 1966, DeMary and his brother were instrumental in arranging approximately twenty-five different automobile collisions throughout the Western District of Louisiana[2] (Tr. 1470). All of the collisions were clear liability

[1] Petitioner was one of 14 defendants named in a 40-count indictment charging all defendants with one count of conspiracy and various defendants with 39 counts of mail fraud. Eleven defendants were severed and tried separately. Of petitioner's two remaining co-defendants, one was acquitted completely and the other was convicted of all charges. Petitioner was acquitted of conspiracy.

[2] The instant indictment enumerated fourteen specific fraudulent collisions which occurred in various locations throughout the Western District of Louisiana.

cases. Attempts were made to stage the collision in a secluded area where the culpable driver of the "hitter" vehicle would either fail to yield the right of way or run through a stop sign and strike the rear of the target vehicle (Tr. 1545). Following the collision, the guest passengers were referred to various attorneys for processing of the personal injury claims with the insurance companies involved. The attorneys, who had been advised by the DeMarys of the fraudulent nature of the claims, would arrange for cash advances for each of the claimants.

Kenneth DeMary first met petitioner in approximately 1963. In 1965, in addition to practicing medicine, petitioner was part-owner of a recording studio in the Bossier, Louisiana, area, together with Henri Loridans, one of the attorneys who knowingly handled many of the fraudulent claims referred to him by the DeMarys[3] (Tr. 1521–1522). At the time, Kenneth DeMary was engaged in scheduling recordings for various bands and consequently frequented petitioner's studio on several occasions. Shortly after the inception of the scheme, Kenneth DeMary approached petitioner and asked if he would handle some of the collisions. Petitioner agreed to participate and handle "* * * anything we would give him up in that area in North Louisiana" (Tr. 1514, 1517).

During the course of petitioner's participation in the scheme, DeMary would occasionally contact him even prior to the collision to alert him and discuss the

[3] Loridans was convicted in the Eastern District of Louisiana for his part in the scheme.

feasibility of hospitalizing the intended "patients" (Tr. 1524). Moreover, DeMary was a frequent visitor to petitioner's office, where they discussed various "patients" being treated by petitioner; DeMary occasionally obtained from him medical reports for the attorney-participants (*ibid.*).

In those instances where the claimant resided in the Bossier-Shreveport area, they were referred by Kenneth DeMary, or one of his confederates, to petitioner for "medical treatment." Petitioner and the DeMarys made a maximum effort to get the "patient" to petitioner's office on at least one occasion. This insured that petitioner's records and reports to the insurance carriers reflected a credible medical history and physical description of the patient. Nevertheless, the testimony of Kenneth DeMary, Randle Meek and Rosemary Clark established that on at least two occasions petitioner provided medical reports and bills without ever seeing the patients.

The reports and bills prepared and submitted by petitioner were proved at trial to be false in many respects. Aside from the fact that they were knowingly predicated on false injuries sustained in staged collisions, the testimony of numerous witnesses established that they reflected charges for "treatments" never rendered, injections never administered and office visits never made.

In connection with his testimony, petitioner produced his patient records, which he contended substantially comported with the bills he caused to be submitted to the insurance companies. The testimony

adduced concerning these records strongly suggested that petitioner had altered them. The treatment dates listed in chronological order generally agreed with the recollection of the witnesses as to the number of times they actually saw petitioner. In many instances, however, listed in the right-hand margin was an additional series of treatment dates. These later entries were made with a different pen and were identified as being written by petitioner (Tr. 2150). When all the treatment dates, both those listed in chronological order and the subsequent ones in the margins, were added together, they generally agreed with the number of treatments reflected on the bills transmitted to the carriers.[4]

ARGUMENT

1. Petitioner's contention that the court erred in not granting a severance or a new trial because multiple conspiracies were charged is without merit.

The scheme to defraud in which petitioner was involved was a unitary on . It involved the staging of a succession of automobile collisions, coordinated by two individuals, the DeMary brothers. Central to this scheme was the employment of attorneys and physicians to certify and process the fraudulent claims. When petitioner joined in the common scheme as one of the physicians, he was fully apprised that it was of an ongoing nature and involved numerous false collisions. See *Blumenthal* v. *United States*, 332 U.S.

[4] Petitioner stipulated to the use of the mail, thus obviating the need for the government to prove through its witnesses the actual uses of the mails charged in the indictment (Tr. 1300–1301).

539, 550. The court thus did not abuse its discretion in refusing to grant petitioner's motion for a severance or a new trial.

Nor is there any merit to petitioner's contention that, since he was found not guilty of the conspiracy charge, he therefore could not be guilty on any of the substantive counts. An acquittal for conspiracy does not preclude a conviction for the substantive offense, see *United States* v. *Tierney*, 424 F.2d 643, 645 (C.A. 9), certiorari denied, 400 U.S. 850; *United States* v. *Cole*, 449 F.2d 194, 201, n. 4 (C.A. 8), certiorari denied *sub nom. Woodward* v. *United States*, 405 U.S. 931. Moreover, consistency in verdicts is not necessary. See *United States* v. *Mills*, 456 F.2d 1111, 1112 (C.A. 6), certiorari denied, 406 U.S. 960; *Lowther* v. *United States*, 455 F.2d 657, 663 (C.A. 10); *United States* v. *Carbone*, 378 F.2d 420 (C.A. 2), certiorari denied, 389 U.S. 914.

Petitioner's contention that, in effect, the conspiracy acquittal retroactively invalidated the admission of hearsay statement of co-conspirators is insubstantial. Hearsay statements of co-conspirators are admissible against a defendant if his participation in the conspiracy is shown by a fair preponderance of other evidence. See *United States* v. *Bey*, 437 F. 2d 188, 190–192 (C.A. 3); *United States* v. *Geaney*, 417 F. 2d 1116, 1120 (C.A. 2), certiorari denied *sub nom. Lynch* v. *United States*, 397 U.S. 1028. Such was the case here.

2. Petitioner's contention that the district court erred in interpreting the jury request for medical

reports is without merit. After the case had been submitted to the jury, the jury requested that they be allowed to inspect all of the petitioner's reports submitted to the insurance companies.[5] The district court judge thereupon sent to the jury all the bills on petitioner's stationary that were sent to the insurance company and twenty-eight patient records of petitioner. All these items had been introduced into evidence.

Petitioner contends that this was error because he did not send any of these bills directly to the insurance company, but rather to co-defendant Payton Covington, who then sent them to the insurance company. The claim is insubstantial. The request of the jury was not for bills sent directly by petitioner, but rather for bills submitted to the insurance companies by petitioner.

Nor could the jury have been misled into believing that petitioner sent the records directly to the insurance companies. All the bills reflected on their face the fact that they had been sent by petitioner to attorneys.

3. Petitioner's contention that the court erred in not declaring a mistrial is insubstantial. Following the trial, which lasted almost a month, the jury deliberated for three days before reaching a verdict, beginning at 11:50 a.m. on the first day and reaching a

[5] "Please furnish (1) patient's records, and (2) bills to insurance companies submitted by Doctor Parkman" (Tr. 2871).

verdict at 11:58 a.m. on the third day. On several occasions during this period they indicated that they could not reach a verdict. In response, the district court judge directed the jury to continue their deliberations.

Whether a jury should continue to deliberate after they have indicated that they are deadlocked is a matter within the discretion of the court. See *United States* v. *Pope*, 415 F. 2d 685, 690 (C.A. 8), certiorari denied, 397 U.S. 950. Here, there was no showing of abuse of that discretion, see *DeVault* v. *United States*, 338 F. 2d 178, 182 (C.A. 10); hence there was no occasion for permitting an examination of the jury following their verdict. See *Dickinson* v. *United States*, 421 F. 2d 630, 632 (C.A. 5); *United States* v. *Allied Stevedoring Corp.*, 258 F. 2d 104, 105–106 (C.A. 2).

4. Petitioner also contends that the court erroneously denied his requests for a bill of particulars and for production of records. Seven months before trial, petitioner was given all the materials and documents which the government intended to introduce at trial. The purpose of a bill of particulars is to place the defendant on notice of the charges and to allow him effectively to prepare his defense, thus avoiding surprise at trial. *Wong Tai* v. *United States*, 273 U.S. 77, 82. No showing of surprise or other prejudice has been made here, and, as no clarification of issues or nature of offenses was sought, there was no abuse of discretion in denying petitioner's motion. See *Duncan*

v. *United States,* 392 F. 2d 539, 541 (C.A. 9), certiorari denied, 391 U.S. 935.

5. Petitioner contends further that his motion for a new trial, based upon alleged knowing use by the government of perjured testimony, was improperly denied. The record does not reflect perjury on the part of witness Kenneth DeMary, nor any effort by the government to elicit perjury. Any discrepancy between his prior testimony and that in this case was fully explored on cross-examination and argued thereafter to the jury.[6] Here, as in *United States* v. *Hamilton,* 452 F. 2d 472, 476 (C.A. 8), "[petitioner's] counsel has not directed [the Court's] attention to any direct evidence of the procurement by the prosecution, or for that matter by any other person, of perjured testimony."

6. Petitioner's contention that the district court erred in denying his motion for a new trial, because the government had suggested that petitioner did not pay the proper income tax and that he fabricated evidence, is insubstantial.

During petitioner's direct examination, his attorney

[6] DeMary testified in a prior trial that he had not at that particular time spoken with petitioner at a recording studio (Tr. 58–61); he did not testify that no such conversation had ever taken place. In this case, when asked about a specific automobile collision, he testified that he had made prior arrangements with petitioner, during a conversation at the recording studio, for a fraudulent medical examination (Tr. 1513–1514, 1517). It is in no way evident that the same collisions were under discussion in each case, or that the government specifically sought, in the instant case, to elicit the testimony from DeMary that he talked to petitioner at a recording studio.

questioned him extensively on his gross receipts as reflected by income tax returns. It was petitioner's intention to show that because of his large income, he would have no motivation for engaging in the fraud he was charged with (Tr. 2107, 2031–2042). On cross-examination the government sought to establish, using the same tax returns, that there was a significant disparity between petitioner's gross receipts and his net reported income. Thus it was petitioner, not the government, who raised the issue of his income tax returns.

In regard to the suggestion that petitioner falsified his medical records, the evidence strongly supported the inference that his medical records were altered by petitioner to comport with the records sent to the insurance company. This fabrication of evidence was properly exposed, as it bore on petitioner's guilty knowledge. See *United States* v. *Wilkins,* 385 F.2d 465, 472 (C.A. 4).

Moreover, petitioner failed to raise either of these two points in his motion for a new trial. Therefore, the district court could not have possibly erred in failing to grant a new trial on this basis.

7. It is further contended that the testimony of various witneses given in another related trial, in another jurisdiction, should have been disclosed before trial under the Jencks Act, 18 U.S.C. 3500. But that statute, which makes various materials available only after a witness has testified on direct examination, was aimed at compelling production of those statements "in the possession of the United States." The

testimony at issue here was of public record and no more available to the government attorney than to defense counsel. Nevertheless, the United States Attorney offered to make his copy of the 5,600 page New Orleans transcript available for inspection and duplication prior to trial; the offer was not accepted.

8. Petitioner further contends that the procedure used in the interview of the jury foreman had the prejudicial effect of pressuring him to adopt a pro-government stance. The foreman was summoned to the district judge's chambers for a private interview to determine whether his distant kinship to a defendant would require the foreman to be excused. This interview was conducted with the consent of the defense counsel, and there is no evidence to indicate that it had any prejudicial effect.

9. Finally, petitioner complains of a prejudicial delay in prosecution. The indictment, returned June 26, 1969, was well within the five-year statute of limitations. Following disposition of voluminous pretrial motions, the case was assigned on October 17, 1970, and set for trial on August 9, 1971. When it was learned that the transcripts in the companion case in New Orleans had not yet been completed, all parties agreed to a continuance until January 17, 1972. A continuance of seven days, requested by petitioner after dismissal of one of his five attorneys, delayed the start of trial to January 26, 1972. Petitioner at no time requested an earlier trial and has alleged no prejudice to his own case as a result. The absence of any prejudice, the failure to request an earlier trial,

and the fact the delay was not attributable to the government obviates the claim of denial of Sixth Amendment rights. See *Barker v. Wingo*, 407 U.S. 514, 517; *United States* v. *Marion*, 404 U.S. 307, 313.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.
HENRY E. PETERSEN,
Assistant Attorney General.
JEROME M. FEIT,
JAMES A. ROTHSCHILD,
Attorneys.

MAY 1974.

U.S. GOVERNMENT PRINTING OFFICE 1974